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## POST OFFICE LTD

### NOTE

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We have been provided with a copy of Bond Dickinson's helpful note entitled "Civil claims by SPMRs" ("Bond Dickinson's Note"), which sets out the potential civil actions that a SPMR could try to bring against POL in certain circumstances. This note is intended to respond to, or clarify, some of the issues raised by the Bond Dickinson Note. It should be understood however that we only touch upon matters within our own criminal law remit.

#### Preamble

1. The preamble to Bond Dickinson's Note identifies the circumstances to which it refers as being where "...because of errors found in the Horizon system, (1) an on-going criminal prosecution against an SPMR was abandoned or (2) an SPMR's conviction was overturned". We deal with these matters here:

#### Cases terminated

- a. To clarify, whilst a number of criminal prosecutions against SPMR's and clerks have been terminated since the publication of the Second Sight Interim report, none was stopped because of errors found in the Horizon system. In all cases the prosecution was stopped because it was considered that the continued prosecution of a particular SPMR/clerk no longer remained in the Public Interest. In concluding that a particular prosecution should or should not be continued, the test set out in the Code for Crown Prosecutors and, latterly, the additional guidance provided in the draft POL Prosecution Policy, was applied and the advice to continue or terminate was determined under those provisions. In each case POL was provided with a written advice on the matter, in which the test was identified and applied in a clear and transparent manner. This last point is important because, in the event of a complaint being made, POL's response would undoubtedly be to the effect that all decisions were made in a clear, fair and transparent manner, in writing and in accordance with the national standard

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test established and used by both the Director of Public Prosecutions and all other prosecutors.

- b. Where cases have been discontinued, the Judge and defendant were told, in court and on the record, of the reason for terminating the case. No judge or defendant has been told that a case has been terminated for want of evidence – all were informed that the reason was unconnected to matters of evidence or Horizon defects but was to be found in the Public Interest stage of the Code for Crown Prosecutors.

**Overtured convictions**

- c. We have considered 308 prosecutions, fully reviewed in detail 53 of those prosecutions and advised that material be disclosed in 26. Whilst such an eventually cannot be entirely ruled-out, in none of those cases do we consider that the defendant has a reasonable prospect of overturning their conviction, save in one case in which we expressed concern about the defence approach and not the prosecution case. It is to be noted that, as of the date of writing, no convicted defendant appears to have sought the leave of the Court of Appeal to appeal against their conviction.

**Malicious Prosecution**

- 2. It is instructive to set out, in general terms at least, the process adopted by POL to prosecute SPMR's and clerks:

- a. Before a prosecution is initiated a thorough investigation is conducted by POL investigators. Once POL Security considers that a case may merit prosecution the file is sent to independent criminal specialist solicitors for advice. Upon receipt, solicitors provide a comprehensive advice detailing and considering the facts of the case; any potential defences; whether any further evidence is required; issues of disclosure; the personal circumstances of the suspect; evidence and public interest issues; the merits of prosecution; and, where prosecution is advised, the most appropriate charge(s). All of these matters fall within the scope of the Code for Crown Prosecutors issued by the Director of

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Public Prosecutions and that Code is applied by prosecuting solicitors when advising POL.

- b. Because the decision whether to charge or not is one for POL and not prosecution solicitors, both the advice and file is returned to POL Security for a charging decision to be made. Where POL Security determines that a prosecution should commence, the summons is issued and the file returned to prosecuting solicitors for the matter to proceed.
  - c. Once a prosecution is commenced, public policy, in the shape of the Code for Crown Prosecutors, requires that prosecuting solicitors keep the matter under continuous review and, where the circumstances require, advise that the matter be discontinued.
  - d. It has invariably been POL's policy to follow the advice provided by their independent solicitors.
3. For those reasons we consider it extremely unlikely that any SPMR could even begin to make out a case for Malicious Prosecution. Whilst the decision to prosecute is made by POL, they do so only upon the considered advice of independent solicitors following the appropriate public policy and where matters of law and evidence have been deliberated upon by lawyers outside of the POL organisation. We consider it safe to say that, in the extremely unlikely event that POL, or an individual at POL, were to determine that a SPMR should be wrongly prosecuted, the process followed by POL would identify such a situation and prevent it from going forward.
4. The result of this process therefore is three-fold:
- i. POL is protected from Malicious Prosecution claims by the very process used to initiate and pursue prosecutions;
  - ii. Should a legitimate claim for Malicious Prosecution emerge, that claim would properly stand against prosecuting solicitors and not POL;

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- iii. That protection would not be available to an organisation which conducted its prosecutions 'in-house', that is, in POL's case, using lawyers employed directly by POL.

**Malicious Falsehood**

- 5. Staying firmly within the criminal arena, we do not consider that a claim for Malicious Falsehood could properly be founded upon a legitimate prosecution and subsequent acquittal of a SPMR, for the following reasons:

**"Prosecution"**

- a. Where the prosecution is initiated and pursued under the process described in the preceding paragraphs, any prosecution would be properly brought and accordingly could not be described as 'malicious'. Similarly if, by reason of the continuous review duty outlined in paragraph 2c above, a properly brought prosecution were discontinued, again such a prosecution could not be described as malicious.

**"Innocent"**

- b. In the courts of England and Wales no defendant is ever found to be "innocent". Rather, defendants are found to be "not guilty" of the offence charged. This distinction arises because the test to be applied, in both the Magistrates' Court and by juries in the Crown Court, is the same: defendants are guilty only if the tribunal is "satisfied so that they are sure" of guilt. This of course means that many defendants are acquitted not because he or she is "innocent" but rather because the tribunal is not sure of guilt. The distinction between the two concepts is important here because "not guilty" does not and cannot mean "innocent"; it means "not proved", a very different proposition from "innocent".
- c. It is to be noted that distinction between the two concepts of "innocent" and "not guilty" is regularly made by Crown Court judges in answer to costs applications made by acquitted defendants.
- d. Finally on this point, the distinction to be drawn between "innocent" and "not guilty" means that, in a properly brought prosecution based on independent legal

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advice and where there was sufficient evidence to raise a charge but where the defendant was acquitted, it could never be said that the allegations made by the prosecutor were “false”.

#### **Protection from Harassment Act 1997**

6. Whilst we agree with the comments made in the Bond Dickinson Note we would add the following:
  - a. Importantly for our purposes, the High Court has held that “...the conduct of oppressive litigation could not amount to harassment...” within the 1997 Act.
  - b. Within the criminal arena, the protection provided by the process adopted by POL to prosecute, and set out at paragraph 2 above, similarly protects POL under this heading.
  - c. It remains the case that there is no fixed definition of “harassment” in the 1997 Act. However the higher courts have held, variously, that: the Act is concerned with conduct targeted at an individual which was calculated to produce alarm or distress and which was oppressive and unreasonable; that such behaviour sought to be controlled under the Act was conduct such as stalking, antisocial behaviour by neighbours and racial harassment and hatred.
7. Accordingly it is our view that POL is not susceptible to proceeding under the Protection from Harassment Act 1997.

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